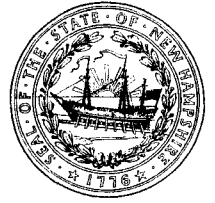




The State of New Hampshire
Department of Environmental Services



Michael P. Nolin
Commissioner

Richard Kalin
P.O. Box 516
Hollis, NH 03049

Rebecca Kalin, Executrix
Estate of Catherine B. Kalin
131 Avenue B
New York, NY 10009

Re: Hayden Mill Pond Dam #119.09

**NOTICE OF PROPOSED
ADMINISTRATIVE FINE
No. AF 06-046**

September 19, 2006

I. INTRODUCTION

This Notice of Proposed Administrative Fine is issued by the Department of Environmental Services, Water Division to Richard Kalin, and to Rebecca Kalin as Executrix of the Estate of Catherine B. Kalin, pursuant to RSA 482 and NH Admin. Rule Env-C 601. The Division is currently proposing that fines totaling \$46,000 be imposed against Richard Kalin and the Estate of Catherine B. Kalin for the violations alleged below. **This notice contains important procedural information. Please read the entire notice carefully.**

II. PARTIES

1. The Department of Environmental Services, Water Division ("the Division"), is a duly-constituted administrative agency of the State of New Hampshire, having its principal office at 29 Hazen Drive, Concord, New Hampshire.
2. Richard Kalin is an individual having a mailing address of P.O. Box 516, Hollis, NH 03049.
3. Rebecca Kalin is an individual, apparently appointed as Executrix of the Estate of Catherine B. Kalin, having a mailing address of 131 Avenue B, New York, NY 10009.

III. SUMMARY OF FACTS AND LAW SUPPORTING CLAIMS

1. Pursuant to RSA 482, DES regulates the construction and maintenance of dams so as to meet the stated statutory objectives, including the regulation of water levels, the lessening of flood damage, and the enhancement of public safety. Pursuant to RSA 482:87, the Commissioner of DES has adopted NH Admin. Rules Env-Wr 100-700 to implement this program.
2. Pursuant to RSA 482:89 the Commissioner of DES is authorized to impose fines up to \$2,000 per violation for violations of the statute, or of rules adopted pursuant to the statute, or of any order or permit issued under the statute. Pursuant to RSA 482:89, II, the Commissioner of DES had adopted Env-C 613 to establish the schedule of fines for such violations.

3. According to Division records, Mr. Richard Kalin is the registered owner of the dam in Hollis, New Hampshire known as the Hayden Mill Pond Dam, further identified as Dam #119.09 (the "Dam"). The Dam is located approximately 0.6 mile upstream of the secondary state highway, NH Route 122.

4. Upon information and belief, the Estate of Catherine B. Kalin is the legal owner of the real property upon which the Dam is situated, and Rebecca Kalin has identified herself to the Division as the Executrix of her mother's estate.

5. RSA 482:12 requires DES to periodically inspect all dams in the state which may pose a menace to public safety, and to take action to ensure that the dam is repaired if the inspection indicates that the public safety so requires.

6. RSA 482:2, V defines a "dam in disrepair" as a dam which is a menace to public safety and is incapable of safely impounding flood waters to its crest, or is incapable of maintaining a reasonably constant level of waters impounded or which does not contain adequate gates and sluiceways to provide for the holding or controlled discharge of waters impounded.

7. RSA 482:11-a requires the owner of a dam to maintain and repair the dam so that it does not become a dam in disrepair.

8. Env-Wr 101.25 defines "menace to public safety" as any dam, the failure of which would threaten life or property. Property, when used in this context, means buildings, structures or other real estate.

9. Env-Wr 101.08 defines "Class B Structure" as a dam with a significant hazard potential, the failure of which would result in structural damage to a secondary state highway as well as major economic loss to residential structures. (A recent amendment to RSA 482:2 has changed the name of a formerly designated "Class B Structure," to a structure with "significant hazard potential.")

10. The Dam has been classified as a structure with "significant hazard potential" by DES because its failure would result in damage to the downstream secondary state highway, NH Route 122, as well as cause major economic loss to residential structures.

11. On December 21, 2001, an inspection of the Dam was conducted in accordance with RSA 482:12 and Env-Wr 302.02 and the following deficiencies were noted:

- There are trees located on the crest of the right embankment;
- There is cracked concrete on the upstream face of the Dam to the right of the spillway;

- The overall condition of the concrete spillway is poor. There is spalled concrete on the right spillway channel wall, the downstream face of the spillway has severe concrete erosion on the right side at the contact with the right wall, and the spillway center buttress wall has severe erosion on the left side approximately 1 foot above the apron;
- There are missing stones and soil erosion at the downstream end of the right spillway training wall at the contact of the concrete and stone wall;
- There are several tree branches overhanging the spillway discharge area, that are close to reaching the concrete channel floor;
- The downstream stone wall of the Dam is severely leaning;
- The historical seepage under the stone at the toe of the Dam is flowing at approximately 10 gallons per minute(gpm);
- There is seepage through the stones located to the left of the low level outlet;
- There are missing stones and soil erosion downstream from the low level outlet on the right side stone training wall;
- There is a wet area/possible boil located approximately 50 feet from the downstream toe. The flow was clear and estimated at 2 gpm;
- The operations and maintenance plan needs to be updated; and
- The Emergency Action Plan (EAP) has not been updated or tested.

12. On June 27, 2002, DES sent a Letter of Deficiency (LOD) to Richard Kalin requesting that the deficiencies be corrected by September 1, 2002.

13. By September 10, 2002, Mr. Kalin had partially complied with the LOD. The trees had been removed, monitoring of the leaning wall had begun and the EAP had been updated and tested.

14. On June 10, 2005, another inspection was conducted in response to a report that a section of the Dam had failed. It was found that a 30' long by 7' wide section of the dam crest along the downstream face had fallen down hill. The exposed crest section was dry and approximately 23 feet of the crest width of the Dam remained intact. Adjacent sections of the wall appeared unstable and in danger of failing. There were several sinkholes in the crest of the Dam adjacent to both the upstream and downstream masonry walls.

15. On August 2, 2005, DES sent another Letter of Deficiency (LOD) to Mr. Kalin requesting that the deficiencies noted during both inspections be corrected according to the schedule set out in the LOD.

16. A follow-up inspection was conducted on November 2, 2005 to check on the outstanding deficiencies noted during previous inspections. Mr. Kalin was met at the site. Mr. Kalin had failed to complete the items requested by September 1, 2005, and additional deficiencies were noted. Additional deficiencies included further unraveling of the downstream masonry face of the Dam.

17. On November 16, 2005, the DES sent a letter to Mr. Kalin requesting voluntary drawdown of the impoundment.

18. The Dam is in disrepair as defined in RSA 482:2 V.

19. The Dam in its current state of disrepair is a menace to public safety, as a failure of the Dam would damage the downstream secondary state highway, NH Route 122, as well as cause major economic loss to residential structures.

20. On January 17, 2006, DES issued Administrative Order No. WD 06-005 (the "Order") to Richard Kalin pursuant to RSA 482:12 and RSA 482:87, which required Mr. Kalin to drawdown the impoundment, repair or remove the Dam. According to the return receipt received from the United States Postal Service, Mr. Kalin received the Order on February 8, 2006. A copy of the Order was sent via e-mail to Rebecca Kalin, as Executrix of the Estate of Catherine Kalin.

21. The Order required Mr. Kalin to 1) Retain the services of a Professional Engineer, licensed in the State of New Hampshire, to perform an investigation and stability analysis related to the stability of the entire length of the downstream stone face of the Dam; 2) Update the Operation & Management plan which should describe the control of impoundment levels, monitoring/maintenance procedures, and identify emergency contact personnel; and 3) Update and test the Emergency Action Plan. These actions were to be completed by March 1, 2006. Upon information and belief, DES asserts that the Order has not been complied with and that these actions were not completed by March 1, 2006 and have not been completed, to date.

IV. VIOLATIONS ALLEGED AND PROPOSED ADMINISTRATIVE FINES

1. Richard and Rebecca Kalin have violated RSA 482:11-a by failing to maintain the Dam to prevent it from becoming a "dam in disrepair." For this violation, Env-C 613.02(h)(3) specifies a fine in the amount of \$2,000 for a "Class B dam."

2. Richard Kalin has failed to comply with Administrative Order No. WD 06-005 issued by DES to Richard Kalin on January 17, 2006. For failing to comply with an administrative order issued pursuant to RSA 482:12, Env-C 613.02(i) specifies a fine in the amount of \$2,000 per calendar month or portion thereof that compliance is not achieved after the deadline specified in the order for each provision of the order that is not complied with. The deadline for three provisions of the Order, Paragraphs E.2, E.3 and E.4 was March 1, 2006. The deadline for Paragraph E.5 set out in the Order was September 1, 2006. To date, Mr. Kalin has not complied with the provisions of the Order set out in Paragraphs E.2, E.3, E.4 and E.5. This violation is ongoing.

The total fine currently being sought is \$46,000, plus \$2,000 per calendar month or portion thereof that compliance is not achieved after the deadline specified in the Order for each provision of the Order that is not complied with, after September 30, 2006.

V. REQUIRED RESPONSE, OPPORTUNITY FOR HEARING

Pursuant to Env-C 601.06, the Respondents required to respond to this notice. Please respond no later than October 24, 2006 using the enclosed colored form.

1. If you would like to have a hearing, please sign the appearance section of the colored form (upper portion), check the appropriate line requesting a **formal hearing** and return it to the DES Legal Unit, at the address noted on the form.
2. If you wish to discuss the possibility of settling the case, please sign the appearance, check the appropriate line indicating a desire to **meet informally** and return it to the DES Legal Unit.
3. If you choose to waive the hearing and pay the proposed fine, please sign the waiver (lower portion) and return it **with payment of the fine** to the DES Legal Unit.

You are not required to be represented by an attorney. If you choose to be represented by an attorney, the attorney must file an appearance and comply with NH Admin. Rule Env-C 200.

VI. DETERMINATION OF LIABILITY FOR ADMINISTRATIVE FINES

Pursuant to Env-C 601.09, in order for any fine to be imposed after a hearing, the Division must prove, by a preponderance of the evidence, that you committed the violations alleged and that the total amount of fines sought is the appropriate amount under the applicable statute and rules. Proving something by a preponderance of the evidence means that it is **more likely than not** that the thing sought to be proved is true.

If the Division proves that you committed the violations and that the total amount of fines sought is the appropriate amount under the applicable statute and rules, then the fine sought will be imposed, subject to the following:

* Pursuant to Env-C 601.09(c), the fine will be **reduced by 10%** for each of the circumstances listed below **that you prove, by a preponderance of the evidence**, applies in this case:

1. The violation was a one-time or non-continuing violation, **and** that you did not know about the requirement when the violation occurred, **and** the violation has not continued or reoccurred as of the time of the hearing, **and** any environmental harm or threat of harm has been corrected, **and** that you did not benefit financially, whether directly or indirectly, from the violation.
2. At the time the violation was committed, you were making a good faith effort to comply with the requirement that was violated.


3. You have no history of non-compliance with the statutes or rules implemented by DES or with any permit issued by DES or contract entered into with DES.
4. Other information exists which is favorable to your case which was not known to the Division at the time the fine was proposed.

**** Pursuant to Env-C 601.09(d) and (e), the fine shall be increased by 10% for each of six (6) possible aggravating circumstances listed therein that the Division proves, by a preponderance of the evidence, apply in this case; up to the maximum fine stated in the statute under which the Division is seeking the fine.**

*******IMPORTANT NOTICE*******

An administrative fine hearing is a formal hearing. All hearings will be recorded, and all witnesses will testify under oath or affirmation. At the hearing, the Division will present testimony and evidence to try to prove that you committed the violation(s) alleged above and that the fine(s) should be imposed. **The hearing is your opportunity to present testimony and evidence that you did not commit the violation(s) and/or that the fine(s) should not be imposed, or that the fine(s) sought should be reduced.** If you have any evidence, such as photographs, business records or other documents, that you believe show you did not commit the violation(s) or that otherwise support your position, you should bring the evidence to the hearing. You may also bring witnesses (other people) to the hearing to testify on your behalf.

Information regarding this proposed fine may be made available to the public via the DES Web page (www.des.nh.gov). If anyone has any questions about this matter, please contact the DES Legal Unit, at (603) 271-7509.


COPY
Jerry O. Stewart, P.E., Director
Water Division

Enclosure (NHDES Fact Sheet #CO-2002)

- ec: Michael J. Walls, DES Assistant Commissioner
Jennifer J. Patterson, Sr. Asst. Attorney General, NHDOJ/EPB
Public Information Officer, DES PIP Office
Grace Levergood, Dam Safety Bureau/DES
- cc: Gretchen Hamel, Legal Unit Administrator
Hollis Board of Selectman
Hollis Conservation Commission

***** RETURN THIS PAGE ONLY *****

**RICHARD KALIN IS REQUIRED BY LAW
TO RESPOND TO THIS NOTICE.**

PLEASE RESPOND NO LATER THAN OCTOBER 24, 2006

Please check the appropriate line and fill in the requested information below:

APPEARANCE On behalf of Richard Kalin:

_____ I request to have a **formal hearing** scheduled in this matter.

_____ I would like to **meet informally** to discuss the issues in this matter.

WAIVER OF HEARING On behalf of Richard Kalin:

_____ I certify that I understand the right to a hearing regarding the imposition of the proposed administrative fine and that I hereby waive those rights. The fine payment in the amount of \$46,000 paid to "Treasurer, State of New Hampshire" is enclosed.*

** If payment is made by a check, draft, or money order that is returned due to insufficient funds, pursuant to NH RSA 6:11-a, DES may charge a fee in the amount of 5% of the face amount of the original check draft, or money order or \$25.00, whichever is greater, plus all protest and bank fees, in addition to collecting the amount of the original check draft, or money order.*

Pursuant to Env-C 203.05 please provide the following information:

Signature Date

Name (please print or type): _____

Title: _____

Phone: _____

RETURN THIS PAGE ONLY AND ANY PAYMENT TO:

DES Legal Unit

Attn: Michael Sclafani, Legal Assistant

P.O. Box 95

Concord, NH 03302-0095

ENVIRONMENTAL Fact Sheet



29 Hazen Drive, Concord, New Hampshire 03301 • (603) 271-3503 • www.des.nh.gov

CO-2

2002

Administrative Fines of the Department of Environmental Services

The Commissioner of the Department of Environmental Services (DES) is authorized by several statutes to impose administrative fines for certain violations of those statutes. In order to implement this authority, the Commissioner has adopted rules which specify the procedures for notifying people that a fine is being proposed and which specify the fine amount for any given violation. These rules are identified as Chapter Env-C 600.

Administrative fine proceedings follow a defined path. The first step is for a Division of DES to issue a Notice of Proposed Fine. The Notice will inform you of the violations the Division believes you have committed, together with the dollar amount of the fine that is being proposed. At this point, a final decision as to whether to impose the fine **has not been made** ... the Notice simply initiates the proceeding. The Notice will also inform you that you have a right to have a hearing before a final decision will be made, and may give a date and time for the hearing.

The Notice you receive will have a page attached to it on which you can indicate whether you will attend a hearing or whether you are waiving your right to a hearing and paying the fine which has been proposed. **YOU MUST COMPLETE AND RETURN THIS FORM.** The worst thing you can do if you receive a Notice is to ignore it! Under the rules which have been adopted, the case can proceed even if you don't respond. In order to achieve the best result, you must participate in the process.

When you receive a Notice of Proposed Fine, if you are interested in trying to settle the case without going to a formal hearing you should contact the person identified in the Notice. Many fine cases are settled in this way, often with a lower fine, a payment schedule, and/or a suspended fine. The negotiations need to start soon after the Notice is received, though. Don't wait until the day scheduled for the hearing to ask about settling the case.

If the case proceeds to a hearing, the Commissioner will designate a person to serve as a hearing officer to preside at the formal hearing. The hearing officer will not have prior knowledge of the Division's allegations, and will be neutral insofar as the outcome of the case is concerned. At the hearing, the Division will be required to prove that the violation(s) occurred and that the proposed fine is warranted. You will have an opportunity to ask questions of (cross-examine) the Division staff, and also present your own evidence, including testimony of witnesses if you wish, to show why the fine should not be imposed.

(over)

After the hearing is over, the hearing officer will compile the record (i.e. all of the information that was received at the hearing) and will make a recommendation to the Commissioner as to whether or not the fine should be imposed. The Commissioner will make a decision based on the evidence and testimony, and the decision issued by the Commissioner will specifically state the reasons for the decision.

The rules adopted by the Commissioner require the proposed fine to be reduced in certain circumstances, which are listed at Env-C 601.09. These include that you have not previously violated a law or rule implemented by DES, or that you acted in good faith. The Commissioner also has the discretion to allow you to pay a fine on a payment schedule, and/or to suspend all or a portion of the fine conditional upon remedying the underlying violation or staying in compliance with DES requirements for a specified period of time.

Sometimes people are concerned that the findings and rulings made by the Commissioner might be used against them in a separate proceeding (for instance, if their neighbor sues them for damages arising out of the same violation(s) for which they are being fined). In such a case, DES has accepted payment of the fine with a specific denial of liability. This is like pleading "no contest" to a traffic ticket: you pay the fine assessed, but are not admitting that you did anything wrong.

This fact sheet is intended as a basic source of information concerning DES administrative fines. It is not intended to replace the laws and rules regarding administrative fines, but merely to provide a summary of them.

For more information contact the DES Legal Unit, PO Box 95, Concord, NH 03302-0095, (603) 271-6072.